

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 2000 Session

STATE OF TENNESSEE v. BILLY GENE DEBOW, SR.

Appeal from the Criminal Court for Sumner County
No. 358-1998 Jane Wheatcraft, Judge

No. M1999-02678-CCA-R3-CD - Filed August 2, 2000

The Defendant, Billy Gene DeBow, Sr., was convicted of first degree murder after a jury trial in Sumner County, Tennessee. He was sentenced to life imprisonment. In this appeal as right, he raises the following nine issues: (1) whether the evidence was insufficient to sustain a conviction pursuant to Rule 13(e) of the Tennessee Rules of Appellate Procedure; (2) whether the trial court erred in failing to give the jury a complete instruction regarding the definition of "premeditation"; (3) whether the Tennessee statute proscribing premeditated first degree murder, Tennessee Code Annotated § 39-13-202(a)(1), is unconstitutional because it violates the Defendant's due process rights; (4) whether the trial court erred in failing to instruct the jury on self-defense; (5) whether the trial court erred in advising jurors that the State was not seeking the death penalty; (6) whether the trial court erred in excusing for cause two prospective jurors from service because they did not "feel comfortable" sitting on a murder trial; (7) whether the trial court erred in permitting a misleading courtroom demonstration and in admitting into evidence an inaccurate and misleading diagram which unfairly prejudiced the Defendant; (8) whether the trial court erred in admitting into evidence certain gruesome and graphic photographs of the victim's wounds when the probative value of such evidence was substantially outweighed by the danger of unfair prejudice; and (9) whether the cumulative effect of the foregoing errors deprived the Defendant of a fair trial. We hold that the trial court erred by excusing two prospective jurors for cause because they were "uncomfortable" sitting on a murder case, but that such error was harmless. The remainder of the Defendant's issues lack merit. Accordingly, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed.

DAVID H. WELLES, J., delivered the opinion of the court, in which, JERRY L. SMITH, J., and ROBERT W. WEDEMEYER J., joined.

Walter H. Stubbs, Gallatin, Tennessee, for the appellant, Billy Gene Debow, Sr.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Sallie Wade Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The proof at trial established that the Defendant and the victim, Jimmy Lee Wiggins, were friends, and they spent time together washing their cars during the afternoon on February 20, 1998. There were no problems between them at that time. Later that evening, Tonda Wiggins, the victim's wife, and Aileen Marten encountered the victim at Julio's Market in Gallatin, Tennessee. The victim was with two other men, Joe Talley and Darnell Fitts. Ms. Wiggins and the victim began arguing in the parking lot about Sandy DeBow, the Defendant's sister, with whom the victim had fathered a child. Sandy DeBow was a source of conflict between the victim and his wife, who was nine months pregnant.

Around 10:00 p.m. that evening, the Defendant arrived at the market while the victim and Ms. Wiggins were arguing. The Defendant and Ms. Wiggins then began to argue, and soon the victim interceded and began arguing with the Defendant. The argument escalated into a fight, during which the Defendant ran across the street with the victim chasing him, picked up a broomstick, and struck the victim with the stick. The victim then chased the Defendant down the street to a lawn mower shop, telling the Defendant to "apologize to [his] wife." Subsequently, the Defendant and the victim returned, coming back from opposite sides of the market, and the Defendant got into his car and left.

The victim entered Ailene Martin's vehicle, and Ms. Wiggins entered the other vehicle with Joe Talley and Darnell Fitts. They all went to the Sheriff's Department to attempt to intercept the Defendant, whom they presumed was going to file a complaint against the victim for assault. Instead, the Defendant drove slightly over seven miles down Highway 31-E to his grandparents' house, where he retrieved his uncle's 16-gauge shotgun and six shotgun shells. The gun and the shells were kept in different locations, but the Defendant knew where to find them. When the Defendant did not arrive at the Sheriff's Department, Ms. Martin went home, and the victim, Ms. Wiggins, Mr. Talley, and Mr. Fitts all went to the Northside Lounge, a bar also known as "Oldham's," in Gallatin.

Shortly after the victim and the others arrived at the Northside Lounge, the Defendant pulled up. Henry Adams, a friend of both the victim and the Defendant, testified that when the Defendant first drove up to the Northside Lounge, the victim stated, "We just whipped the shit out of that nigger, and we're fixing to do it again." The Defendant got out of his car and sent Joe Talley into the bar to tell his uncle, Willie DeBow, to come outside. The Defendant and the victim began arguing again, and the Defendant pointed the shotgun at the victim. The Defendant's uncle came out of the bar, took the shotgun from the Defendant, placed the shotgun in the Defendant's car, and told the Defendant to leave. The Defendant's uncle, Willie DeBow, did not realize that the shotgun belonged to him. The Defendant got into his car and left. As he was leaving, the victim threw a beer bottle at the Defendant's car, but struck Willie DeBow's truck instead. Willie DeBow testified that the victim said he would pay for the damage because Mr. DeBow would need the money to bury the Defendant since the victim was going to kill the Defendant.

After the Defendant left the Northside Lounge, he drove to his father's house a few blocks away and got his father out of bed. While his father was getting dressed, the Defendant removed the shotgun from his car and placed it in his father's car. The two then returned to the Northside Lounge in the Defendant's father's car. When they got out of the car, the victim yelled, "I'm not scared of you or your daddy." The victim was across the street from the Defendant at this point. The Defendant's father, Gene DeBow, testified that he replied, "Man, I ain't got nothing to do with this." The Defendant and the victim started exchanging words, and Gene DeBow walked to the rear of his car and opened the trunk to retrieve a piece of copper pipe to defend himself if the victim should "jump on" him. The Defendant retrieved the shotgun from his father's car, fired one shot into the air, and then said something to the effect of, "the second one's for you." The victim said something like "kill me, kill me" or "go on, shoot me nigger, see what you can do with that shotgun." The victim was backing up with his hands in the air when the Defendant stepped further out into the street and shot the victim twice. The victim turned after he was shot once, he was shot again, and then he ran until he collapsed. He had been shot once in the chest and once in the arm.

The Defendant picked up the three remaining shells that were in the street, reloaded the gun, and left the scene. He went to his sister Sandy DeBow's house, where he placed the gun behind a mattress and placed the shells in a dresser. He turned himself in to the police later that night and made a full statement, which was tape-recorded and played for the jury. In that statement, the Defendant indicated that he did not intend to kill the victim, but that he had been assaulted and provoked by the victim until he "snapped" and shot the victim.

SUFFICIENCY OF THE EVIDENCE

The Defendant first challenges the sufficiency of the evidence. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992) (citing State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1976), and State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977)); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Holt v. State, 357 S.W.2d 57, 61 (Tenn. 1962).

In its review of the evidence, an appellate court must afford the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Tuggle, 639 S.W.2d at 914 (citing State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)). The court may not "re-weigh or re-evaluate the evidence" in the record below. Evans, 838 S.W.2d at 191 (citing Cabbage, 571 S.W.2d at 836). Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. Tuggle, 639 S.W.2d at 914.

The Defendant was convicted of first degree murder, which is a premeditated and intentional killing of another. Tenn. Code Ann. § 39-13-202(a)(1). "Premeditation" is "an act done after the exercise of reflection and judgment." Id. § 39-13-202(d). The code also provides as follows:

"Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id.

The Defendant argues that the evidence was insufficient because the State did not prove beyond a reasonable doubt that this was a premeditated killing. He urges us to conclude that he was acting under a state of passion and that he did not reflect upon what he was doing. He points out that this began as a heated confrontation between the victim and the Defendant and that it remained a heated confrontation. However, whether premeditation is present is a question of fact for the jury, and it may be inferred from the circumstances surrounding the murder. State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997); State v. Anderson, 835 S.W.2d 600, 605 (Tenn. Crim. App. 1992). Some relevant factors which tend to support the existence of premeditation include: the use of a deadly weapon upon an unarmed victim; evidence that the victim was retreating or attempting to escape when killed; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime; and calmness immediately after the killing. See Bland, 958 S.W.2d at 660; State v. West, 844 S.W.2d 144, 148 (Tenn. 1992). "[T]he fact that repeated blows (or shots) were inflicted on the victim is not sufficient, by itself, to establish first-degree murder." State v. Brown, 836 S.W.2d 530, 542 (Tenn. 1992).

Looking at the facts in the light most favorable to the State, which we are required to do, we conclude that a rational jury could have found the element of premeditation beyond a reasonable doubt. After the original confrontation with the victim, the Defendant drove seven miles to retrieve his uncle's shotgun and then drove seven miles back to where the victim was located. He pointed the gun at the victim and left only at the insistence of his uncle. Instead of going home at that point, he drove to his father's house, where he moved the shotgun from his car to his father's car and then returned to the place where the victim was located. After exchanging more words with the victim, the Defendant removed the shotgun from his father's car, fired one shot up in the air, and then stated, "the next one's for you." He moved closer to the victim and shot the victim twice as the victim was retreating with his hands in the air. The victim was unarmed. The Defendant picked up the remaining shotgun shells and reloaded the gun before leaving. The Defendant's argument that this homicide was committed during the heat of passion goes to the weight of evidence, not the sufficiency of the evidence. Here, there was ample evidence from which the jury could have determined that the Defendant formed the intent to kill the victim after the exercise of reflection and judgment and that the Defendant's mental state was sufficiently free from passion or excitement so as to be capable of premeditation.

JURY INSTRUCTIONS REGARDING "PREMEDITATION"

The Defendant next argues that the trial court failed to give a complete instruction on the definition of "premeditation." A defendant has a constitutional right to a complete and correct charge of the law. State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). The trial judge, without request, should properly instruct the jury on the law governing the issues raised by the evidence at trial. State v. McAfee, 737 S.W.2d 304, 308 (Tenn. Crim. App. 1987). When the instructions given by the trial judge correctly, fully, and fairly set forth the applicable law, it is not error to refuse to give a special instruction requested by a party. State v. Bohanan, 745 S.W.2d 892, 897 (Tenn. Crim. App. 1987). This Court must read the entire charge and only invalidate it if, when read as a whole, it fails to fairly submit the legal issues or misleads the jury as to the applicable law. State v. Phipps, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994).

Prior to trial, the Defendant moved the trial court to instruct the jury as follows:
The term "premeditation" involves the process of carefully weighing such matters as the wisdom of going ahead with the proposed killing, the manner in which the killing will be accomplished, and the consequences which may be visited upon the killer if and when he is apprehended.

The trial court deferred ruling on this request until after the proof, at which point the request was denied upon the trial court's finding that the pattern jury instruction sufficiently defined the term "premeditation." The Defendant then requested that the court instruct the jury that "[f]or a premeditated killing, the defendant must have thought about, reflected upon, and contemplated the eventual death of the victim." This request was denied as well. Instead, the trial court gave the following pattern jury instruction on first degree murder:

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

- (1) that the defendant unlawfully killed the alleged victim;
- and
- (2) that the defendant acted intentionally. A person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result;
- and
- (3) that the killing was premeditated.

A premeditated act is one done after the exercise of reflection and judgment. Premeditation means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. The mental state of the accused at the time he allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. If the design to kill was formed with premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the design was carried into effect. Furthermore, premeditation can be found if the decision to

kill is first formed during the heat of passion, but the accused commits the act after the passion has subsided.

The Defendant asserts on appeal that the pattern instruction does not adequately define what constitutes "reflection and judgment"; thus, the instruction does not adequately distinguish first degree murder from second degree murder, which is a knowing killing. See Tenn. Code Ann. § 39-13-210(a)(1). He argues that the instruction does not sufficiently inform the jury that a killing must be "deliberate" in order to constitute first degree murder. The conception of "deliberation" has been one of the distinctions of first degree murder in Tennessee since 1829, see Brown, 836 S.W.2d at 538, and it was delineated as a separate element of first degree murder in the Tennessee Code until 1995. See Tenn. Code Ann. § 39-13-202(a)(1) (1991) (repealed 1995). The Brown court distinguished the concept of "premeditation," the previously formed design to kill, from the concept of "deliberation," which requires coolness and reflection. See Brown, 836 S.W.2d at 538-41. In 1995, the Tennessee Legislature amended the first degree murder statute by eliminating the separate requirement that a killing be "deliberate," but it incorporated the concept of "deliberation" within the definition of "premeditation" by defining "premeditation" as "an act done after the exercise of reflection and judgment" and stating, "The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation." Tenn. Code Ann. § 39-13-202 (d).

We conclude that the pattern jury instruction given by the trial court accurately, fully, and fairly reflects the law in Tennessee on the elements of first degree murder and adequately informs the jury of the meaning of premeditation. The instruction informs the jury that the defendant must intend to kill, that the defendant must form the intent to kill prior to the act, and that the defendant must reflect on the act while free from passion. This adequately distinguishes first degree murder from second degree murder, which requires only that the defendant act knowingly in committing the act. See id. § 39-13-210(a)(1). Thus, the trial court did not err in refusing to give a special instruction.

CONSTITUTIONALITY OF FIRST DEGREE MURDER STATUTE

Next, the Defendant argues that the statute proscribing premeditated first degree murder violates his due process rights because it is unconstitutionally vague. He asserts that the statute is unconstitutionally vague because the definition of premeditation does not adequately explain what is meant by "an act done after the exercise of reflection and judgment," such that in many cases the conduct which constitutes first degree murder and the conduct which constitutes second degree murder will be indistinguishable. We rejected this contention in the preceding issue when dealing with the pattern jury instruction, and we reject it here as well.

Second degree murder is a "knowing killing of another." Id. "'Knowing' refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct

is reasonably certain to cause the result." Id. § 39-11-302(b). As previously stated, first degree murder is a premeditated and intentional killing of another, and premeditation requires reflection and judgment. Id. § 39-13-202. The definition of "premeditation" indicates that the intent to kill must have been formed prior to the act itself, and the state of mind of the defendant must have been sufficiently free from excitement or passion as to be capable of premeditation. Id. § 39-13-202(d). While first degree murder requires some forethought, second degree murder requires only that the defendant be simultaneously aware of the conduct or the result. We have previously held that these statutes sufficiently differentiate between the degrees of homicide, and we reach the same conclusion here as well. See State v. Dennis Wade Suttles, No. 03C01-9801-CR-00036, 1999 WL 817205, at *9 (Tenn. Crim. App., Knoxville, Sept. 29, 1999) aff'd, No. E0998-00088-SC-DDT-C, 2000 WL 875910 (Tenn., Knoxville, June 26, 2000) (not for publication). This issue is without merit.

FAILURE TO INSTRUCT ON SELF-DEFENSE

The Defendant argues that the trial court erred by failing to instruct the jury on self-defense. A defendant is entitled to an instruction on a defense if the existence of the defense is fairly raised by the proof. Tenn. Code Ann. § 39-11-203(c). In determining whether evidence fairly raises a defense, the trial court must assess the evidence in the light most favorable to the defendant. State v. Bult, 989 S.W.2d 730, 733 (Tenn. Crim. App. 1998); State v. Ivy, 868 S.W.2d 724, 728 (Tenn. Crim. App. 1993). The Defendant requested an instruction on self-defense at trial, but the trial court denied his request, finding no credible evidence that the Defendant was in fear of imminent bodily injury. We agree with the trial court that an instruction on self-defense was not warranted.

According to the Tennessee Code,
[a] person is justified in threatening or using force against another person when and to the degree that person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds. There is no duty to retreat before a person threatens or uses force.

Tenn. Code Ann. § 39-11-611(a) (emphasis added). Looking at the evidence in the light most favorable to the Defendant, the initial encounter between the Defendant and the victim may have qualified as assault in light of the evidence that the victim went to the Sheriff's Department because he thought the Defendant would go there to file a complaint for assault. The next two encounters, however, involved only an exchange of words until the Defendant shot the victim. Both occurred after the Defendant left an altercation and then returned. Although there was some testimony that the victim threatened to kill the Defendant, there was no testimony that the victim took immediate actions to do so. Instead, the victim was unarmed and was standing fifteen to twenty feet away from the Defendant when he was shot. There is simply no objective basis for us to find that the Defendant reasonably believed that he was in imminent danger of death or serious bodily injury. Accordingly, the refusal to instruct the jury on self-defense was not error.

INFORMING JURY THAT THIS WAS NOT A DEATH PENALTY CASE

The Defendant also contends that the trial court erred in informing the prospective jurors that the State was not seeking the death penalty. During voir dire, two potential jurors expressed their reluctance to sit on a first degree murder case and indicated that they thought a possible penalty would be death. The judge informed the jurors, over the Defendant's objection, that this was not a death penalty case.

The Defendant argued at trial and he argues on appeal that the most the judge could tell the jurors was that they were not to be concerned with the possible penalties. He asserts that by informing the jury that the death penalty was not an option and by not informing the jury of the other possible penalties, the likelihood of conviction of the greater charge was increased because the consequences of a first degree murder conviction were less substantial than the jury might have otherwise believed. The Defendant relies on Tennessee Code Annotated § 40-35-201(b), which provides as follows:

In all contested criminal cases, except for capital crimes which are governed by the procedures contained in §§ 39-13-204 and 39-13-205, and as necessary to comply with the Constitution of Tennessee, article VI, section 14, and § 40-35-301, the judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on possible penalties for the offense charged nor all lesser included offenses.

First and perhaps foremost, we note that the Defendant has misconstrued the language of the statute. The statute provides that the judge and attorneys may not comment on possible penalties. Because this was not a capital case, the death penalty was not a possible penalty. Thus, by instructing the jury that the death penalty was not an option, the trial judge was not violating the language of the statute.

Moreover, we do not believe that the legislature intended the statute to permit jurors on a non-capital first degree murder case to sit on a jury while thinking that the death penalty might be imposed as a result of their verdict. The provision relied upon by the Defendant was enacted by the legislature in 1998, and the prior provision was repealed. See id. § 40-35-201(b) (Supp. 1999). The prior provision provided that upon motion of either party, the court should instruct the jury on the possible penalties for the offense charged and all lesser included offenses. See id. § 40-35-201(b)(1) (1997) (repealed 1998). The prior provision was a reflection of the people's "desire for truth in the sentencing process." State v. King, 973 S.W.2d 586, 591 (Tenn. 1998). It was challenged frequently, however, on the ground that it impermissibly encouraged juries to find defendants guilty of more serious charges in order to ensure more jail time when the possible sentences were irrelevant to guilt or to innocence. See State v. Nichols, __ S.W.3d __, __ (Tenn. 2000); King, 973 S.W.2d at 589-90; State v. Jason M. Weiskopf, No. 02C01-9611-CR-00381, 1998 WL 840000, at *2-4 (Tenn. Crim. App., Jackson, Dec. 4, 1998). While the constitutionality of the prior statute was ultimately upheld on the grounds that sentencing information does have a degree of relevance to the jury's determination of guilt or innocence and that the legislature had determined that such

information was relevant, see Nichols, ___ S.W.3d at ___; King, 973 S.W.2d at 592, the legislature opted to amend the statute such that jurors could no longer be informed of the possible penalties in non-capital cases. See Tenn. Code Ann. § 40-35-201(b) (Supp. 1999). In capital cases, however, the jury must be informed that death is a possible penalty and must be informed of the other possible penalties for first degree murder because the jury is to determine whether the defendant is to be sentenced to death, to imprisonment for life without the possibility of parole, or to imprisonment for life. See id. § 39-13-204(a).

Although most potential jurors do not understand the intricacies of the death penalty statutes, they are aware that the death penalty is a possible penalty in Tennessee for first degree murder. Without being informed otherwise, jurors on a first degree murder case might very well believe that death could be imposed as a result of their verdict, even when the state is not seeking the death penalty. Thus, jurors on such a first degree murder case might be more inclined to find the defendant guilty of a lesser included offense if they do not believe that the defendant's conduct warranted death. By prohibiting the courts from informing Juries that death is not an option, the legislature would in essence be creating the same problem that it had before: Juries might decide the cases based on the potential punishment rather than the defendant's guilt or innocence of the crime charged. We do not believe that this was the intent of the legislature. Accordingly, we conclude that the statute relied upon by the Defendant does not prohibit a trial judge from informing the jury in a non-capital case that the death penalty is not a punishment option.

EXCUSING JURORS FOR CAUSE

The Defendant asserts that the trial court erred in excusing two prospective jurors for cause during voir dire. "The ultimate goal of voir dire is to see that jurors are competent, unbiased, and impartial, and the decision of how to conduct voir dire of prospective jurors rests within the sound discretion of the trial court." State v. Howell, 868 S.W.2d 238, 247 (Tenn. 1993). The trial court may excuse prospective jurors during voir dire "for good cause appearing." Tenn. Code Ann. § 22-2-308(d); see also Tenn. R. Crim. P. 24(b). In examining a potential juror's impartiality, the standard for dismissal for cause is "whether the juror's views would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)); see also State v. Mann, 959 S.W.2d 503, 533 (Tenn. 1997); State v. Alley, 776 S.W.2d 506, 518 (Tenn. 1989). That standard does not, however, require that a juror's bias be proved with "unmistakable clarity." Id. The trial court's findings regarding impartiality are entitled to a presumption of correctness because they involve a determination of demeanor and credibility, and the burden rests on the defendant to establish by clear and convincing evidence that the trial court's determinations were erroneous. State v. Smith, 993 S.W.2d 6, 29 (Tenn. 1999); Alley, 776 S.W.2d at 518.

We agree with the Defendant in this case that the trial court's dismissal of the two prospective jurors was clearly erroneous. The trial court made no findings of fact regarding the prospective jurors impartiality, but dismissed them after they indicated that they were "uncomfortable" sitting on a murder case. One juror stated at the beginning of jury selection, "I don't feel comfortable

serving on a murder trial. I've done jury duty before. I don't want to pick on either side. I want you to know that right up front." Without further inquiry, the trial court excused the juror. In continuing voir dire, the prosecutor asked the panel, "Do any of you have any personal convictions, religious convictions, simply emotional type convictions, any reason why, if the State of Tennessee proves beyond a reasonable doubt that this defendant committed first-degree murder, that you could not convict?," to which another prospective juror replied, "I can't do it either." When asked by the court whether he could convict someone of first degree murder, the prospective juror responded, "I think it is wrong to kill someone, no matter what." The prospective juror then expressed confusion about whether the death penalty was an option for the judge to impose if the jury found the Defendant guilty, to which the court responded, "No." After a bench conference in which the defense objected to the trial court informing the jury that the death penalty was not an option, the prosecutor asked the juror, "Because this is a first-degree murder case, do you feel comfortable in sitting on this jury?" The prospective juror responded, "No," and the trial court excused him without further inquiry.

We do not believe that the jurors' statements that they did not feel "comfortable" sitting on a murder trial met the requirements of Wainwright for dismissal for cause due to the jurors' views. See Wainwright, 469 U.S. at 424. Other than the comment by the second prospective juror suggesting that he could not impose the death penalty, the statements did not reveal the jurors' views at all. Certainly, the statements did not show that the jurors' views prevented them from following the law and applying the law to the facts of the case. The statements in no way indicated that the jurors could not be impartial. At the very least, further inquiry was needed to discover whether the jurors' views would prevent them from being impartial before they were dismissed for cause.

Nevertheless, the Defendant has shown no prejudice by the dismissal of the two prospective jurors. "It is the burden of the defendant to prove prejudice or purposeful discrimination in the selection of a jury. Prejudice will not be presumed." State v. Coleman, 865 S.W.2d 455, 458 (Tenn. 1993). The Defendant argues that he was prejudiced because the dismissal permitted the prosecution to preserve peremptory challenges it might otherwise have had to use, thereby implying that the prosecution essentially received more challenges than the defense. However, our supreme court has stated, "As long as the jury that sits is impartial, the denial or impairment of the right to exercise peremptory challenges does not violate the Sixth Amendment" right to a fair trial. Howell, 868 S.W.2d at 248. While a defendant has the "right to have a fair trial at the hands of an unprejudiced, unbiased and impartial jury," he or she does not have the right to select certain jurors. State v. Smith, 857 S.W.2d 1, 20 (Tenn. 1993). So long as the jury which heard the case was fair and impartial, any error in a trial court's ruling on dismissal for cause is harmless. See Howell, 868 S.W.2d at 248; State v. Davis, 649 S.W.2d 12, 14-15 (Tenn. Crim. App. 1982). The Defendant here has made no showing that the jury which heard his case was unfair or partial; thus, the trial court's error in dismissing the two prospective jurors was harmless. We also conclude that the error is not flagrant such as to establish prejudice to the integrity of the judicial process. See State v. Lynn, 924 S.W.2d 892, 894 (Tenn. 1996).

COURTROOM DEMONSTRATION AND USE OF DIAGRAM

Additionally, the Defendant complains that the trial court erred by allowing a courtroom demonstration of a shell ejection pattern of the shotgun used in the homicide and by admitting an inaccurate and misleading diagram purporting to indicate where the spent shells were located following the shooting. The admission of demonstrative exhibits is within the discretion of the trial judge, and that discretion will not be disturbed absent a clear showing of abuse. State v. Delk, 692 S.W.2d 431, 438 (Tenn. Crim. App. 1985). Likewise, the decision of whether to allow a courtroom demonstration rests within the discretion of the trial judge, and that decision will not be disturbed absent a showing of abuse of that discretion. State v. Underwood, 669 S.W.2d 700, 704 (Tenn. Crim. App. 1984). The Defendant argues that the trial court abused its discretion by allowing the diagram and demonstration because the probative value of the evidence was substantially outweighed by the danger of misleading the jury. See Tenn. R. Evid. 403. He asserts that the evidence was misleading because it unfairly suggested that the Defendant shot the victim while advancing towards him. We conclude that the trial court did not abuse its discretion in admitting the evidence.

The diagram of which the Defendant complains marks the locations of three spent shell casings. The Defendant takes issue with the way the shell casings were located on the diagram. The number "1" denotes the location of a shell found on the side of Blakemore Street opposite the Northside Lounge, the number "2" denotes the location of a shell found by the light pole at the corner of Blakemore Street and Randolph Street, and the number "7" denotes the location of a shell found under a parked truck in a parking area off Randolph Street. However, on the diagram, the number "7" is located on Randolph Street instead of off Randolph Street. The Defendant argues that this inaccuracy was misleading because it portrayed a trail of spent shells crossing Blakemore Street completely and advancing up Randolph Street leading towards the victim, while the testimony of the witnesses only indicated that the Defendant walked out into the middle of Blakemore Street when he fired the second and third shots at the victim, who had moved onto Randolph Street. The State's theory was that the Defendant was advancing towards the victim while firing.

The Defendant also complains of a courtroom demonstration which he asserts was similarly misleading. During his testimony, Tennessee Bureau of Investigation Agent Don Carmen was permitted over the Defendant's objection to eject "dummy" shotgun shells from the shotgun used in the shooting. The "dummy" shells fell onto the carpeted courtroom floor by the feet of the shooter. On cross-examination, Agent Carmen testified that there was no reliable way to determine the location of the shooter from the pattern of shells found at the scene because of variables like the hard surface of a roadway and the opportunity for the shells to roll, bounce, or otherwise move. The State argued at trial that it was not "necessarily" trying to show where a spent shell casing would have eventually ended up, but it was instead trying to show how a spent shell is initially ejected from the weapon. On appeal, the State asserts that the demonstration was probative "to show that the shells are not ejected any significant distance from the firing location. Thus it would be probative to dispel the notion that the spent shell casings, marked by markers 2 and 7, were so far apart from each other because the weapon ejected the spent shell with great force."

While the State did argue that the location of the shells indicated that the Defendant was advancing towards the victim while shooting, and while we question the probative value of the

courtroom demonstration in light of Agent Carmen's testimony, we do not believe that the diagram and demonstration were so misleading as to substantially outweigh their probative value such that the trial court abused its discretion in admitting them. The State had the burden of proving that this was a premeditated murder, and part of the State's theory of premeditation was that the Defendant was advancing towards the victim. In presenting the proof, however, the jury was informed that the diagram was not to scale, and the jury was informed that the shell marked "7" was actually located under a pickup truck in the parking area off Randolph Street instead of in Randolph Street. The jury was also shown numerous photographs of the crime scene which showed the location of the evidence markers, including the marker "7." It was instructed that it should base its decision on the proof offered at trial, not the arguments of counsel. By comparing the photographs to the diagram, the jury could determine for itself the location of the shells in comparison to one another and draw its own conclusions from that evidence. Agent Carmen informed the jury, and defense counsel reminded the jury during closing arguments, that there was no reliable way to determine the location of the shooter from the location of the shells found at the scene. We conclude that the jury had accurate information from which to draw its conclusions, and it was not an abuse of discretion to allow the demonstrative evidence.

ADMISSION OF PHOTOGRAPHS

Finally, the Defendant argues that the trial court erred in admitting into evidence certain photographs of the victim's wounds because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The admissibility of photographs is within the sound discretion of the trial court and will not be reversed on appeal absent a clear showing of abuse of that discretion. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978); see also State v. Stephenson, 878 S.W.2d 530, 542 (Tenn. 1994); State v. Zirkle, 910 S.W.2d 874, 888 (Tenn. Crim. App. 1995). Generally, "photographs of the corpse are admissible in murder prosecutions if they are relevant to the issues on trial, notwithstanding their gruesome and horrifying character." Banks, 564 S.W.2d at 950-51. However, "if they are not relevant to prove some part of the prosecution's case, they may not be admitted solely to inflame the jury and prejudice them against the defendant." Id. at 951. Even relevant photographs may be excluded if their probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Tenn. R. Evid. 403; Banks, 564 S.W.2d at 951. "The more gruesome the photographs, the more difficult it is to establish that their probative value and relevance outweigh their prejudicial effect." Banks, 564 S.W.2d at 951.

In considering the admissibility of the photographs, the trial court found that the photographs were not gruesome and that the probative value of the pictures outweighed any prejudicial effect. We cannot find that the admission of the photographs constituted an abuse of discretion. The two photographs at issue included a close-up view of the wound to the victim's chest and a view of both the victim's chest wound and the wound to the victim's right arm. Neither photograph showed the entire body or the face of the victim. Although the photographs depicted blood on the victim's wounds, we do not feel that the pictures were particularly gruesome. Photographs may be used to show the location of wounds. State v. Goad, 707 S.W.2d 846, 850 (Tenn. 1986). They may also be admissible as evidence of the brutality of the attack and the extent of the force used against the victim. Brown, 836 S.W.2d at 551. While, "[i]n many cases, the facts concerning the injuries and

the cause of death may be adequately established and better explained by a pathologist," Banks, 564 S.W.2d at 951-52, photographs may be introduced to illustrate testimony. Stephenson, 878 S.W.2d at 542. Photographs are not rendered inadmissible because the subject portrayed could be described in words or because the photograph is cumulative evidence. See State v. Terrence L. Davis, No. 02C01-9511-CR00343, 1997 WL 287646, at *7 (Tenn. Crim. App., Jackson, June 2, 1997); Collins v. State, 506 S.W.2d 179, 185 (Tenn. Crim. App. 1973). Here, the location and extent of the wounds were relevant to the testimony regarding the distance between the victim and the Defendant and the State's theory that the victim was shot the second time while trying to flee the scene as the Defendant was advancing towards him. Because the photographs were not overly gruesome, their probative value was not outweighed by the danger of unfair prejudice.

CONCLUSION

We conclude that the trial court erred in dismissing two prospective jurors for cause, but that such error was harmless. All other issues presented by the Defendant lack merit. Accordingly, the judgment of the trial court convicting the Defendant of first degree murder is affirmed.

DAVID H. WELLES, JUDGE